

FINAL STATEMENT OF REASONS

December 2, 2011

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The information contained in the Initial Statement of Reasons (ISR) at the time of Public Notice remains unchanged with the exception of the following modifications.

UPDATED INFORMATION DIGEST

After the 15-day comment period, which closed November 22, 2011, modifications were made to the originally proposed text, to make it clear that these regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.

In addition, a correction was made to a section number in the proposed text that referenced to the prior section for the definition of trusted system. As originally proposed, the text referenced to last year's version of the proposed text's section number instead of the current year's section number. The error is obvious to the reader and considered nonsubstantial. The change is described below:

Section 22620.8 - Replace the reference to section 23070 with 22620.7 for the definition of trusted system.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF DECEMBER 10, 2010 THROUGH JANUARY 24, 2011

The originally proposed regulations were made available for public comment for at least 45 days from December 10, 2010 through January 24, 2011, which included a public hearing on January 24, 2011. Twenty-one written comment letters were received, one of which was received at the public hearing on January 24, 2011, along with one testimony at the hearing. Over half of the comment letters were similar so comments have been aggregated and summarized as a group and responded to as a group. Pursuant to Government Code sections 11346.9(a)(3) and (a)(5), the Secretary of State summarizes and responds to those comments as follows:

Comment No 1 (twelve commenters; see Tabs H-5, H-6, H-7, H-8, H-9, H-10, H-11, H-12, H-14, H-15, H-16 and H18) - Section 22620.8: After reviewing the recommendations taken from section 5.4.1.4 of "AIIM ARP1-2009" on image formats, the commenters express concern that the recommendations are seriously flawed. AIIM's suggestion that "the TIFF format be utilized with caution," and that organizations should instead adopt PDF/A as their archival standard, sends the wrong message to technology users and developers in California and the world. Constricting entities to use of a proprietary

format such as PDF/A stifles software development and inhibits the industry's ability to respond to customer needs. Choosing a format controlled by a single vendor, runs contrary to the principles of long-term preservation and archiving because there is no guarantee that the format will be supported in years to come.

Reject: Nothing in the regulations requires “that organizations should instead adopt PDF/A as their archival standard.” Rather, the regulations state that “if PDF/A is chosen” as the file format for long-term storage, then the standard for PDF/A as approved by the American National Standards Institute (ANSI) should be used.

The Agency for Information and Image Management (AIIM) expresses caution when utilizing TIFF, and this has merit for the reasons stated in Section 5.4.1.4 of “AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems.” Section 5.4.1.4 is incorporated by reference as allowed under Government Code section 12168.7 (b), which states, “the Secretary of State, in consultation with the Department of General Services, shall approve and adopt appropriate standards established by ANSI or AIIM.” The Secretary of State's office along with the Department of General Services have been represented and active in the standards committee responsible for development of “AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems” since the 2002 version of this guideline was released. The latest version of the guideline released in 2009 was prepared and approved by a committee of 22 members from various technical and subject matter backgrounds. With such a diversified approval process before AIIM approves any document released by its standard committee, the Secretary of State's office disagrees the recommendations from AIIM are “seriously flawed”. If the TIFF format has vulnerabilities, the Secretary of State should ensure the public is aware of the risks associated with this file format so that compensating controls can be put in place to ensure a trusted system is maintained.

As additional support, AIIM has provided a response dated February 15, 2011, clarifying why the “AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems” recommends exercising caution when using TIFF (see TAB H-21).

Because PDF/A maximizes technology to be device independent and self-contained, the file format will not need any one vendor to be supported in years to come. See AIIM's letter dated February 15, 2011, which provides additional information about the PDF/A (see TAB H-21).

Comment No 2 (ten commenters; see Tabs H-5, H-6, H-7, H-8, H-9, H-10, H-11, H-14, H-15, and H18) - Section 22620.8: The commenters question the assertion that the use of TIFF requires wrappers or headers.

Reject: Nothing in the “AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems” section incorporated by reference in the

regulations states that TIFF requires wrappers or headers; but rather section 22620.8 shares AIIM's concerns regarding what could happen if wrappers or headers are used.

Comment No 3 (ten commenters; see Tabs H-5, H-6, H-7, H-8, H-9, H-10, H-11, H-14, H-15, and H18) - Section 22620.8: The commenters state that "cautioning against TIFF would directly limit innovation without bringing benefits to the state and local entities," how TIFF has a vast array of toolsets, or how TIFF can be rendered as PNG files "on the fly" that are both browser- and network-bandwidth friendly.

Reject: Nothing in the proposed regulations prevents the use of TIFF so we disagree with the assertion that cautioning against TIFF would directly limit innovation; or prevent the use of existing toolsets or current rendering processes.

Comment No 4 (ten commenters; see Tabs H-5, H-6, H-7, H-8, H-9, H-10, H-11, H-14, H-15, and H18) - Section 22620.8: The commenters state that adopting the proposed recommendation would put California ECM users and developers at a severe technological disadvantage and are astonished that the California Secretary of State's office would impose such restrictions on the technology industry, which plays a vital role in ensuring the health and strength of California's economy.

Reject: Nothing in the proposed regulations prevents the use of TIFF so we disagree that adopting the proposed regulations would put California ECM users and developers at a severe technological disadvantage. However, the Secretary of State encourages ECM users and developers impacted by the proposed regulations to participate in the future development of the standards and guidelines developed by AIIM. Active participation in Standard Committees, specifically the "Implementation Guidelines," will expand the conditions, which are proven to compensate for TIFF vulnerabilities, including the discretionary use of variants of the general TIFF specification that is not standardized. There is no cost to join. One can request to be a voting member on the committee or just an observer. More information can be found at www.aiim.org/Resources/Standards. As noted on AIIM's website, the work produced by these groups is accredited by ANSI and often adopted by ISO.

Comment No 5 (ten commenters; see Tabs H-5, H-6, H-7, H-8, H-9, H-10, H-11, H-14, H-15, and H18) - Section 22620.8: The commenters state that Laserfiche has been developing enterprise content management (ECM) software which allows the company to recommend and make various assertions, including that TIFF images should be encrypted so that unauthorized access is mitigated.

Accept in part/Reject in part: The Secretary of State agrees with the commenters that TIFF images can be encrypted, especially for transmission or communication purposes, so that unauthorized access is mitigated; but since the proposed regulations do not address the use of encryption, this comment is irrelevant. However, the Secretary of State would be remiss if we did not clarify that there is a difference between the use of encryption for efficient and secure transmission vs. the storage of content in a trusted system, and share the concerns from AIIM about the use of encryption (see Tab H-21).

Comment No 6 (one commenter; see Tab H-1) - Section 22620.7: The commenter states that within the guidelines, there is the requirement that an electronic record must be written to media that does not permit additions or deletions and that storage processes must be verified through periodic audits. Compliance with the latter places a large amount of responsibility on the information technology group in an organization and can be affected by the resources available to this group as well as the inclination to devote time and effort to long term record preservation, especially since the complexities of storing digital records continue to multiply at such notable speed.

Reject: The Secretary of State disagrees that the proposed regulations will generate more work than is already required today. This is because the proposed regulations do not require anything that is not already required under Government Code 12168.7(d), which states that “state officials shall ensure that microfilming, electronic data imaging, and photographic reproduction are done in compliance with minimum standards or guidelines, or both, as recommended by ANSI or AIIM for recording of permanent records or nonpermanent records.”

The proposed regulations do not require that the responsibility be on the information technology group in an organization, although that could be one option. Regardless of the option chosen, one cannot ignore the need to verify through an independent audit that the documents stored to electronic media cannot be altered.

Comment No 7 (one commenter; see Tab H-2) - Section 22620.3: The commenter expresses concern about section 22620.3's broad scope of applicability, and submits a suggestion for more clearly defining “official documents” or “official records.” These suggestions include clarifying that the terms apply to “final, fully executed records” or that which “excludes preliminary drafts, copies, notes, or other documents or records not intended to be retained in the ordinary course of business.”

Reject: The inclusion of the words “final, fully executed” may inadvertently restrict official documents or official records that an entity may deem necessary to store onto a “trusted system.”

Comment No 8 (one commenter; see Tab H-2) - Section 22620.2: The commenter believes without the changes to more clearly define “official documents” or “official records,” the proposed regulation may apply to all records – notes, draft, copies, e-mail, messages, etc. because of the definition in the California Public Records Act that defines a “record” as “any writing containing information relating to the conduct of the public’s business that is prepared, owned, used or retained...regardless of physical form or characteristics.”

Accept in part/Reject in part: A record that may be public as defined in the California Public Records Act may or may not include a document or record stored to a trusted system. The Government Code provision that authorizes the Secretary of State to adopt the proposed regulations covers those documents stored and managed in a trusted system,

i.e., a system in which there is no plausible scenario in which a document retrieved from or reproduced by the system could differ substantially from the document that was originally stored. The proposed regulations refer to electronic content management systems and clarify the definition of a “trusted system.” The proposed regulations do not mandate that records be stored to electronic media, nor do the proposed regulations mandate that any or all “official records” or “official documents” be stored to a trusted system. Rather the proposed regulations provide the conditions that allow for the system, where “official records” or “official documents” as defined by the entity are to be stored, to be considered trusted. In other words, regardless of what the California Public Records Act may define as a document or record, or what may be considered “public,” these proposed regulations will only apply to those documents or records that the entity considers its official record and only those stored to the trusted system. The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that the regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.

Comment No 9 (one commenter; see Tab H-3) - General: The commenter expresses concern that the proposed regulations’ tie to the 2009 private industry document will cause the regulations to become outdated as technology advances. The commenter asserts that the regulations are a benefit, because they reflect generally accepted industry practices rather than being anchored to specific – and dated – technical mandates.

Reject: Section 20 of Title 1 of the California Code of Regulations requires the document that will be incorporated by reference to include the title and date of publication or issuance. Furthermore, Government Code section 12168.7(b) states, “the Secretary of State, in consultation with Department of General Services, shall approve and adopt appropriate standards established by ANSI or AIIM.” It does not allow the Secretary of State to create its own “generally accepted industry practices.”

Comment No 10 (one commenter; see Tab H-4) – Sections 22620.4, 22520.5 and 22620.7: The commenter expresses concern about the proposed regulations’ potential fiscal and operational impact on San Joaquin County. The County has been utilizing an electronic imaging and document management system for over 10 years. The County has invested over \$2.5 million in this system and it would not meet the requirements of sections 22620.4, 22520.5 and 22620.7 “six months after the effective date of these regulations.” It may in fact require the County to replace its existing imaging and document management system requiring a sizable investment in dollars and staff time to upgrade or replace.

Accept in part/Reject in part: Section 22620.4 was written to allow flexibility for entities like San Joaquin County that have existing electronic content management systems. The entity should evaluate the existing system to the greatest extent technologically and procedurally possible (where “should” is advisory, whereas “shall” would have been mandatory.) Also, the regulations do not address the level of effort or duration to comply with existing Government code requirements. The level of effort is not addressed because every system is unique and not all efforts to comply will require a

retrofit or replacement. The duration of time allowed for compliance is not specific, but rather “as soon as practicable” to allow each entity to plan, procure, re-design and/or implement to meet the requirements of Government Code 12168.7. What these regulations have brought forward is a better understanding of what is necessary to comply with Government Code section 12168.7 enacted in 2000. This statute required specified electronic documents be stored to a trusted system where there is no plausible scenario in which a document retrieved from or reproduced by the system could differ substantially from the document that is originally stored. The intent of the proposed regulations is to clarify what is already required under Government Code section 12168.7, not to require something new.

Section 22620.5 of the proposed regulations clarifies what the terms “policies and procedures” mean in Government Code 12168.7(c) by adopting section 6.17 of the Business practices documentation of “AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems.”

Section 22620.7 of the proposed regulations provides the conditions that qualify a document management system as a trusted system.

Absent the proposed regulations, entities subject to Government Code 12168.7 would still be required to follow the standards and guidelines incorporated by reference in the proposed regulations. This is because Government Code 12168.7(d) directs that “state officials shall ensure that microfilming, electronic data imaging, and photographic reproduction are done in compliance with minimum standards or guidelines, or both, as recommended by ANSI or AIIM for recording of permanent records or nonpermanent records” until such time that statewide standards are adopted.

The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that the regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.

Comment No 11 (three commenters; see Tab H-4, Tab H-12, and Tab H-16) – Section 22620.8: The commenters express concern about the proposed regulations’ potential fiscal and operational impact by requiring the use of PDF/A file format. One estimates the cost of \$264 per user for all users to have Adobe software installed on their computer. The others generally express concern over the countless hours of manpower, investments in new hardware and software and training, necessary to comply with the mandate of converting permanent documents to PDF/A.

Accept in part/Reject in part: Nothing in the regulations requires organizations to adopt PDF/A as their file format. Rather, the regulations state that “if PDF/A is chosen” as the file format for long-term storage, then the standard for PDF/A as approved by ANSI should be used. As such, no fiscal impact is being mandated. The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that the regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.

Comment No 12 (one commenter; see Tab H-4) – General: The commenter requests that the proposed regulations be modified to apply only to imaging and document systems purchased AFTER the date the new regulations are adopted.

Reject: See the response to Comment No 10, which states that even absent these proposed regulations, entities subject to Government Code 12168.7 would still be required by Government Code section 12168.7(d) to follow the standards and guidelines incorporated by reference in the proposed regulations for their existing systems.

Comment No 13 (one commenter; see Tab H-13, H-20) – General: The commenters disagree with the conclusion of the Secretary of State that the proposed regulations do not impose a mandated program on local government. The commenter states the California Constitution, Article XIII B, Section 6 requires that whenever the Legislature or any state agency mandates a new program or higher level of service on local government, the state must provide a subvention of funds to reimburse the associated costs. According to the commenters, establishing a new electronic document storage system to comply with the proposed regulations creates a new program that the County must adopt at potentially increased cost.

Accept in part/Reject in part: Nothing in the proposed regulations requires a “new” electronic document storage system or a higher level of service in order to comply with the proposed regulations. If existing systems are in place, then the proposed regulations state that entities should evaluate their existing systems to comply with Government Code 12168.7 for those systems that maintain “official documents” or “official records” that are required to be in a trusted system. The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow. See also the response to Comment 10.

Comment No 14 (two commenters; see Tab H-13, H-20) – Section 22620.4: The commenters state section 22620.2 (a) is inconsistent with section 22520.4.

Reject: Section 22620.2(a) provides that the proposed regulations apply to all electronic documents that are created or stored six months after the effective date. The six month period is intended to allow entities that do not already have a new system on the effective date of the regulations but might be going through a procurement effort to design and implement a new system, time to include some of the provisions listed in the regulations in their solicitation documents. See also the response to Comment 10.

Comment No 15 (two commenters; see Tab H-13, H-20) – Section 22620.8: The commenters state the proposed regulations generally require the storage of electronic records in PDF/A format, or industry accepted formats such as JPEG, JBIG, JPEG 2000, and do not recognize records stored in other formats that do not lend themselves to conversion to PDF format; e.g. GIS data systems and CAD documents. The commenters

suggest that the proposed regulations consider methods for integrating these different formats, or exempting records created or stored in these formats, and clarify the intent.

Reject: Nothing in the regulations requires the use of PDF/A as a default file format. Rather, the regulations state that “if PDF/A is chosen” as the file format for long-term storage, then the standard for PDF/A as approved by ANSI should be used. If the entity uses a different file format for GIS data system or CAD documents, the Secretary of State’s office recommends the organization follow the intent of section 22620.5 and document its method in a business practices document, even though Section 22620.5 only applies to new systems since it is “prior to system implementation.’ By following industry accepted formats, such as JPEG, JBIG, JPEG 200), and PDF/A, and not proprietary formats limited to one vendor, entities reduce the risk of not being able to access the electronically stored documents or records, if a single vendor goes out of business or can no longer provide support.

Comment No 16 (two commenters; see Tab H-17, H-19) – Section 22620.4: The commenters request the Secretary of State’s office clarify what are the necessary approvals that an entity with an existing electronic content management system must obtain to meet the intent of Government Code section 12168.7 as described in the proposed regulations. Another asks if the intent is to require a local or state agency to re-approve existing systems? If so, how is that process to be undertaken?”

Reject: No change in the proposed text is considered necessary.

Adding clarifying text in the proposed rulemaking with regards to “the necessary approvals” would risk putting in constraints that are not applicable to certain entities because the approvals vary depending on state or local jurisdiction requirements. These regulations affect all county government offices, including the Board of Supervisors, County Recorder, County Auditor, County Treasurer, and social service agencies; city government offices; special districts; and the State Registrar of Vital Statistics. Because of the broad audience impacted, the Secretary of State’s office wrote the language to allow government entities the flexibility to apply the approvals already in place for their jurisdiction, thus the use of the term, “all necessary local and/or state approvals” to meet the intent of Government Code section 12168.7.

The regulations encourage entities to secure all necessary approvals as “soon as practicable” to meet the requirements of complying with AIIM and ANSI standards, but does not specifically require re-approval of any system that is already compliant. Rather, the proposed regulations state electronic content management systems should be evaluated and entities should take action if not compliant under what should already have been in place had the entity complied with Government Code section 12168.7(c).

See, also, the response to Comment No 10.

Comment No 17 (one commenter; see Tab H-17) – Section 22620.7: The commenter requests the Secretary of State’s office to clarify the phrase “independent audit

processes,” namely whether an entity with a trusted document management system may form its own audit team to perform the audit or whether the audit must be performed by a separate entity. And, advise how the independent audit processes relate, if at all, to the requirement for “local and/or state approvals” as set forth in Section 22620.4

Reject: No change in the proposed text is considered necessary. The terms “independent” and “audit” are used in everyday business, and the Secretary of State is not proposing to restrict the terms as used by AIIM in Section 5.3.3 of “AIIM ARP1-2009. The regulations neither prohibit an entity from using its own audit team to perform the audit, nor require a separate entity to conduct the independent audit but clarify the need for the system to be verifiable through a process that is free of influence or control. The official or state entity responsible for the “local and/or state approvals” under Section 22620.4 should take into consideration all of the sections in Chapter 15 of the proposed regulations, not just section 22620.7.

Comment No 18 (one commenter; see Tab H-17) – General: The commenter asks whether the Office of the Secretary of State or another State agency will provide training on trusted system requirements, implementation and/or assessment prior to or after the effective date of the regulations.

Response: Once the regulations are adopted, the Secretary of State will work with state and local governments to provide training. In addition, non-profit entities, such as AIIM already provide training on trusted system requirements.

Comment No 19 (one commenter; see Tab H-17) – Section 22620.8: The commenter points to a typographical error in section 22620.8 of the proposed regulations, which is a “holdover” from a previous draft of the proposed regulations that should be corrected to reference section 22620.7 instead of section 25070.

Response: Agree. The typographical error has been corrected.

Comment No 20 (one commenter; see Tab H-19) – General: The commenter is concerned the regulations may exceed the permissible scope of the Secretary of State’s regulatory authority under Government Code section 12168.7 with regard to electronic records: In the “Statement of Initial Reasons,” the discussion of Proposed Section 22620.2 (Applicability of Electronic Document or Record Standards) recognizes, according to the commenter, that Government Code section 12168.7 applies to municipalities and other local governments that are not state agencies only when paper records are to be destroyed after being transferred to an electronic trusted system. Yet Section 22620.2(c) brings within the scope of the proposed regulations those “electronically originated documents or records” that are maintained as official documents or records. According to the commenter, this is beyond the regulatory authority granted in Government Code section 12168.7.

Reject: In Government Code section 12168.7(a), the California Legislature recognized the need to adopt statewide standards for the purpose of storing and recording permanent

and nonpermanent documents in electronic media. The proposed regulations are under the authority of Government Code sections 12168.7 (a) through (c) and nothing in these code sections limits the storing and recording to paper records.

Also, Government Code sections 12168.7 (a) through (c) do not mandate that any particular document or record be stored electronically but rather mandate the Secretary of State, in consultation with the Department of General Services, to adopt appropriate standards established by AIIM or ANSI; with one of those standards including a requirement that a trusted system be utilized. By providing language in the proposed regulations that recognizes the authority of an entity in some cases to define which documents or records will be considered official, the Secretary of State has complied with the intent of SB 2067 (Bowen), which is to require that reproduction of those documents or records be done in compliance with minimum standards or guidelines, or both, recommended by ANSI or AIIM.

Comment No 21 (one commenter; see Tab H-19) – Section 22620.3: The commenter strongly recommends deleting Proposed section 22620.2(c) or specifically excluding live databases and spreadsheets for the reasons quoted below:

“The "Statement of Initial Reasons" goes on to explain that Proposed Section 22620.3 (Definitions) allows each local agency to define what constitutes an "official record" for purposes of the proposed regulations. This explanation does not eliminate our concern. If a local agency defines an electronically originated record as being the official record, it must meet the standards set forth in the proposed regulations.”

“Example 1: Email is a record originated electronically. If a local agency chooses to retain email electronically as the official record, it will have to comply with the proposed regulations. Nothing in Government Code Section 34090 et seq. or Section 12168.7 permits the Secretary of State to adopt regulations that regulate trustworthy systems for email retention for local agencies.”

“Example 2: Proposed Section 22620.2 brings live databases within the scope of the regulations. A live database is one that is constantly being modified and updated, as new information is added. It is without debate that a live database is an "electronically originated ... record" (Proposed Section 22620.2(c)), and if a local agency designates its code enforcement database as the official record, this provision would require that the database meet the standards in the regulations even though there is no authority in Section 12168.7 for the Secretary of State to adopt regulations that reach such local agency records.”

“We strongly recommend deleting Proposed Section 22620.2(c). Alternatively, the regulations should specifically exclude such live databases and spreadsheets, and we recommend that Proposed Section 22620.2(c) be amended to read:”

“(c) the provisions of this chapter shall also apply to electronically originated documents or records, that are maintained as official document or records, with

the exception of live databases and spreadsheets. Additionally, the provisions of this chapter shall not apply to electronically originated documents or records of those entities whose record retention obligations are governed by Government Code Section 34090 et seq.”

Reject: Nothing in the regulations requires that e-mail, live databases or spreadsheets be official records. If the local agency defines any of these items to be an “official record,” nothing in the regulations is requiring its storage to a trusted system unless the entity itself is requiring storage to a trusted system. There are 11 authoritative sources that reference to 12168.7 for various records or documents and for various purposes. In Government Code 34090.5, it seems the local government has its own criteria for record and document management and only relies on Government Code 12168.7 for the definition of trusted system for recording permanent records and nonpermanent records, not for what is to be stored.

34090.5. Notwithstanding the provisions of Section 34090, the city officer having custody of public records, documents, instruments, books, and papers, may, without the approval of the legislative body or the written consent of the city attorney, cause to be destroyed any or all of the records, documents, instruments, books, and papers, if all of the following conditions are complied with:

(a) The record, paper, or document is photographed, microphotographed, reproduced by electronically recorded video images on magnetic surfaces, recorded in the electronic data processing system, recorded on optical disk, reproduced on film or any other medium that is a trusted system and that does not permit additions, deletions, or changes to the original document, or reproduced on film, optical disk, or any other medium in compliance with Section 12168.7 for recording of permanent records or nonpermanent records.

The regulations provide what minimum standards will be followed for those official records stored to the electronic content management system that must meet the definition of trusted system. Section 22620.6 of the proposed regulations clarifies that it will be up to state and local entities, “prior” to system implementation, to put in writing the policy that the entity will follow to store electronic documents or records. If an existing e-mail, live database or spreadsheet system exists, then section 22620.5 does not apply because the system is already in place. If the entity determines its existing electronic content management system may contain electronic documents or records that meet its definition of “official records” required to be stored to a trusted system, section 22620.4 applies, which provides that the entity “should” evaluate whether those systems and do what it can, when it can to meet the intent of the law, where applicable, to store to a trusted system that meets the definition in Government Code 12168.7. If this is not technologically and procedurally possible because of, for example, hardware or software limitations, antiquated technology, etc. then the regulations acknowledge this by the use of the terms “should” vs. “shall” in Section 22620.4. See also comment 10.

The term “database record” is a technical term associated with information stored in a table, row or column within an application. Government Code 12168.7(a) is specific to

the storing and recording of documents in electronic media and does not cover these types of database records. The regulations clarify that it is irrelevant whether the document is digitally born or imaged. What is relevant for the regulations is that the document, for what the entity considers its “official record” or “official document,” however it may be received, (fax, electronic transmission, mail, etc.) is stored in a non-alterable environment in which the document retrieved from or reproduced by the system can not differ substantially from the document that is originally stored. Therefore, the regulations do not need to be modified to specifically exclude live databases containing database records because these types of records do not fall within the scope of Government Code 12168.7. Deleting the section 23020(c) is not necessary either for the same reason excluding live databases is not needed.

In conclusion, the proposed regulations do not need to be modified to exclude certain records such as e-mails, live databases or spreadsheets or impose unique exceptions for any of the 11 authoritative sources that reference to Government Code 12168.7.

Comment No 22 (one commenter; see Tab H-19) – Section 22620.4: The commenter states section 22620.4 may also exceed the scope of the Secretary of State's regulatory authority, and that it imposes a mandate on local agencies:

“The second paragraph of Proposed Section 22620.4 (Official Document or Record Storage Using Electronic Technologies) presumes that the uniform standards required to be promulgated under the relevant statute apply to municipalities and other local governments that are not state agencies. Again, so long as an entity subject to Section 34090.5 of the Government Code used an enumerated methodology from that section or a “trustworthy system” when it converted a hard copy record to electronic format, the local agency has fulfilled its obligation under state law. Nothing in Section 12168.7 or Section 34090.5 authorizes the Secretary of State to promulgate regulations that require a local agency to review and update its existing electronic content management systems to be in compliance with newly adopted regulations.”

“Further, the proposed regulations impose a mandate on local agencies far in excess of the estimated \$92 to \$319 cost because they require a local agency to update its existing system to be in compliance with the proposed regulations.”

Accept in part/Reject in part: The Secretary of State’s office agrees that nothing in the regulations requires a back-file conversion of any document or record, which appears to be the commenter's concern. Section 22620.4 requests that entities evaluate their existing systems; it was written to avoid imposing a mandate by using the word “should” rather than the word “shall.” The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow. See, also, the response to Comment No 10.

Comment No 23 (one commenter; see Tab H-19) – Section 22620.4: The commenter recommends deleting the second paragraph of Section 22620.4 or amending the paragraph, as quoted below.

“Regulation Section 22620.4 is ambiguous: As we read it, the second paragraph of Proposed Section 22620.4 appears to exempt electronic content management systems from compliance with the regulations if those systems were in place or established before the sixth month after the regulations were adopted by the Secretary of State. This paragraph also appears to require an agency with an existing system to evaluate its system to determine whether it achieves the intent of the new regulations. We cannot tell from the language of Proposed Section 22620.4 if our interpretations are correct and urge your office to clarify the language of this Section.”

The commenter states the regulation provides that the government agency's evaluation of its existing system is to be conducted in a manner "to the greatest extent technologically possible and procedurally possible." It is unclear whether this language establishes a performance standard for evaluating an existing system, or whether it merely provides guidance to an agency in evaluating its existing system and any modifications to that system. If this language is intended to establish a performance standard, no criteria are set forth for meeting that standard.

“We do note that the Secretary of State responded to a similar comment that was received regarding Section 23040 during the last round of rule-making. The second paragraph of Section 23040 is the same as the second paragraph of Proposed Section 22620.4. The response to Comment S2 relating to the second paragraph of Section 23040 stated: "The language does not establish a prescriptive standard nor a performance standard, but guidance and uses the word “should”; not “shall.” We still believe that the language as drafted is ambiguous and that it is advisable to clarify the Secretary of State's intent with regard to this paragraph.”

“As indicated above, we recommend deleting the second paragraph of Section 22620.4. Alternatively, we suggest adding an introductory clause and a sentence to that paragraph to clarify that the provision is guidance and does not set a prescriptive or performance standard. The introductory clause would state: "It is recommended that all existing electronic content management systems...." A new sentence, added at the end of the paragraph, would state: "This paragraph does not establish a prescriptive standard or a performance standard, but provides guidance only."

Accept in part/Reject in part: Government Code section 11240.1 describes the legislative intent to avoid prescriptive standards. Government Code section 11342.590 defines “prescriptive standard” to mean a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements or other quantifiable means. Government Code section 11342.570 defines “performance standard” to mean a regulation that describes an objective with the criteria stated for achieving the objective. These terms describe the process to be followed in developing regulations to reduce unnecessary regulatory burden on private individuals and entities.

No changes are needed to the proposed text of the regulations to define whether the regulation is a prescriptive standard or performance standard. The regulations, however, will be modified under section 22620.1 The text of the regulations clearly states that regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.

Comment No 24 (one commenter; see Tab H-19) – Section 22620.6: (Electronic File Compression) is ambiguous and unreasonably restrictive: Proposed Section 22620.6 states that "only those compression technologies identified in section 5.4.2.4" of the AIIM manual "shall be used." We note that compression technologies identified in the AIIM manual are "ITU Group 4, LZW, JPEG, JPEG 2000, [or] JBIG." While the AIIM manual goes on to state "or other output format standards with no proprietary alterations of the algorithms," it is not clear that an agency subject to these regulations may rely upon that clause, as it is not an "identified" compression technology — it is a description of how to select a compression technology. We believe the proposed regulation is overly restrictive as drafted and should be deleted. If it is not deleted, we recommend modifying it to read:

When it is determined that electronic documents or records are to be compressed and to ensure that electronic documents or records can be accessed after being converted from hard copy format, the document image compression guidelines in section 5.4.2.4 Document image compression of "AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems," approved June 5, 2009, which is incorporated by reference in this section, should be followed.

Reject: No change in the proposed text is considered necessary. The clause as described above can be relied upon as long as the output format contains no proprietary alterations of the algorithms. It does not mean that only the four mentioned formats are acceptable.

Comment No 25 (one commenter; see Tab H-20) – Section 22620.7: The commenter is unclear whether “before the original copy may be destroyed, at least two (2) separate copies of the official document or record must be created on electronic media” means that two separate “instances” of an electronic file will have to be created and stored in different locations (within the same electronic system or on two separate media), or duplicated at least once (for example, be backed up onto another permanent storage system.) Commenter recommends the proposed section be modified to clarify the intent.

Reject: How the two (2) separate copies are created, stored and enforced will be left to local government officials. Our discussions with stakeholders show some have policies that prohibit the back-up copy for disaster recovery purposes to serve as the second copy.

Public Hearing Comments:

The following is in response to the comment letter received during the Public Hearing held January 24, 2011 (see Tab F). It should be noted that the letter is the same one

received under an earlier rulemaking effort that was withdrawn; thus the letter's reference to old proposed section numbers:

Comment No 26 Section 22620.2 (formerly 23020): The commenter asks “What is the definition of ‘Official Record’ as referred to in the regulations?”

Response: The comment above is neither an objection nor a recommendation but request for clarification; therefore, no change in the proposed regulations is considered necessary. However, in response to the request for clarification regarding the term “official record,” this term is defined in statute, regulations, and/or policy documents and defined by the entity impacted by the regulations. See, e.g., section 22620.3, which describes how each entity will use its statutory definition and clarifies what to do if the term is not defined in statute.

Comment No 27 Funding: The commenter states that the “California Records' Offices utilize TIFF format for electronic document storage. The proposed regulations would mandate all Records to perform a very costly conversion to the specified PDF/A format. What funding mechanism is available for this conversion?”

Response: Nothing in the proposed regulations mandates that all Records convert any existing documents to PDF/A. Rather, the regulations state that “if PDF/A is chosen” as the file format for long-term storage, then the standard for PDF/A as approved by ANSI should be used. Since there is no mandate to convert files, there is no funding mechanism available for any conversion efforts.

Comment No 28 Section 22620.7 (formerly 23070): The commenter asks: “If a document management system has already been implemented, is there a certification process to test for its trustworthiness?”

Response: The Secretary of State is not aware of any formal certification process.

Comment No 29 Section 22620.7 (formerly 23070): The commenter asks: “Is there a window of time to obtain a trusted system?”

Response: There is not a window of time to obtain a trusted system because a trusted system is already defined under Government Code section 12168.7 and many of those entities impacted by Government Code section 12168.7 are already required to maintain their records in a “trusted system” as defined in 12168.7 and follow AIIM and ANSI standards and guidelines. See also the response to comment No 10.

Comment No 30 Section 22620.7: The commenter states that many, if not most, of the counties utilize a Kodak Archivewriter (an industry standard) to create microfilm from the digital images for the Official Record. Because the Archivewriters do not support PDF/A format, how should the counties go about creating their film archives? Is TIFF format acceptable as a ‘transitional’ format?

Response: The intent of the regulations is to apply to the electronic storage of the official record, not the transitional format used to get the records to microfilm.

Comment No 31 General: The commenter asks, “With County Recorders moving forward with electronic recording and electronic submission of documents, are these records exempt from the regulations as long as the Official Record is kept in microfilm format?”

Response: The Secretary of State agrees that the regulations would not apply if the Official Record is kept in microfilm format; however, it would be prudent to follow section 22620.5 of the proposed regulations related to Business Practices Documentation to ensure that appropriate policies and procedures associated with the creation and management and storage, in this case to microfilm, of electronic documents or records are documented. If microfilm or microfiche ceases to be the official copy of a record and an electronic copy becomes the official record, then the regulations may apply.

Comment No 32 Compliance: The commenter asks, “What are the repercussions of not being in compliance with the regulations?”

Response: Regulations have the same force and effect of law. Your legal counsel can best advise you on what penalties would apply for failing to adhere to these regulations, should they be adopted.

Comment No 33 The commenter asks “Will the California Courts continue to take evidentiary submittals in their native format?”

Response: The Secretary of State cannot address what the California Courts will or will not continue to accept for evidentiary submittals. It is not the Secretary of State office’s role to interpret each code section’s applicability to each organization but to adopt standards, in consultation with the Department of General Services that meet the intent of Government Code sections 12168.7(a) – (c). However, you may want to refer to the provisions of Evidence Code section 1550, which discuss the use of a trusted system.

Comment No 34 The commenter asks if all written statements from the hearing in a different rulemaking effort will be carried over to this second effort.

Response: No. The Secretary of State’s office does not intend to consolidate comments from different rulemaking notices, nor does the law require an agency to do so.

Comment No 35 The commenter states that the ARMA organization, which is the association of records managers and administrators, the premier records management organization internationally, basically has two objections to this rulemaking. First, the law itself is flawed. The second objection is to the methodology set up for the rulemaking. The commenter believes the statute is based technologically and procedurally in very old and very static science, library science, technology science, and the methodology is simply archaic; and references AIIM ISO: 15489. The commenter

contends that then Senator Bowen, who undertook the bill in the late 90's, had shallow research, no expertise in this area, and was not capable of arriving at a clear understanding of the variables of trusted systems and records preservation. The commenter states that no single organization has a wrap on the truth telling, the approach, or the standard here. Standards are always changing; and the commenter hopes the Secretary of State will find it helpful for her organization to go back to the legislature and seek to amend the law such that it points to the goals of records preservation and not to any specific standard or any specific organization in its guidance as to how the rulemaking needs to be done.

Reject: The suggestions listed by the commenter are rejected for the following reasons:

- 1) The Secretary of State's office does not agree that the law itself is flawed and is complying with Government Code section 12168.7 (b), which states the Secretary of State, in consultation with the Department of General Services, shall approve and adopt appropriate standards established by ANSI or AIIM.
- 2) The Secretary of State's office is, as required, following the methodology set up for rulemaking, in accordance with the California Rulemaking Law under the Administrative Procedure Act.
- 3) With respect to AIIM ISO: 15489, this comment is irrelevant because this document is not referenced in the proposed regulations.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE NOTICE OF MODIFICATIONS PERIOD OF NOVEMBER 7 TO NOVEMBER 22, 2011

Comment No 36 (one commenter; see Tab H-22) – General: The commenter states that the modifications made satisfy concerns previously made during the last three years in the development of the regulations.

Response: The Secretary of State's office appreciates the participation and effort of its interested parties in developing the regulations.

Comment No 37 (one commenter; see Tab H-23) – General: The commenter states that the modifications have evolved to be recommendations as opposed to requirements, which has the benefit of making them more flexible.

Agree: See the response to Comment No. 36.

Comment No 38 (one commenter; see Tab H-23) – PDF/A: The commenter brings up comments about PDF/A.

Response: Since these comments do not pertain to the modifications made, no response is necessary. However, the Secretary of State's office responses made to the comments made during the 45-day comment period may address the commenter's concerns.

Comment No 39 (one commenter; see Tab H-24) – Sections 22620.4, 22620.7, 22620.8: The commenter brings up comments in sections of the proposed regulations that were not part of the modifications made to Section 22620.1 Purpose.

Response: Since these comments do not pertain to the modifications made, no response is necessary. However, a review of the Secretary of State's office response made to comments received during the 45-day comment period, including comments 10, 14, 16, 17, 21, 22 and 23, may address the commenter's concerns.

Comment No 40 (one commenter; see Tab H-25) – Section 22620.1 Purpose: The commenter states that they interpret the modifications to mean sections 22620.1 to 22620.8 are not mandatory to local agencies.

Agree: See the response to Comment No. 36.

Comment No 41 (one commenter; see Tab H-25) – Section 22620.2 to 22620.8: The commenter brings up comments in sections of the proposed regulations that were not part of the modifications made to Section 22620.1 Purpose.

Response: Since these comments do not pertain to the modifications made, no response is necessary. However, the Secretary of State's office responses made to the comments made during the 45-day comment period may address the commenter's concerns.

ALTERNATIVE DETERMINATIONS

During the public comment period, only one alternative to the proposed regulations was presented and is summarized below. After consideration of the alternative, the Secretary of State has determined this alternative would not be more effective in carrying out the purpose for which these regulations are proposed or be as effective as and less burdensome to affected private persons than the proposed regulations.

Alternative 1: Since standards are always changing, the Secretary of State should go back to the legislature and seek to amend the law such that it points to the goals of records preservation and not to any specific standard or any specific organization.

This proposed alternative defeats the intent of the Legislature when the code section was established to set standards. Absent the proposed regulations, entities subject to Government Code section 12168.7 would, by its terms, still be required to follow the provisions incorporated by reference in the proposed regulations unless and until section 12168.7 is amended or repealed.

ECONOMIC IMPACT ON SMALL BUSINESS

The Secretary of State is not aware of any economic impact on small business. No commenter indicated this rulemaking would impact small business.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.